UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

VALERI V. ARTIOUKHINE, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 97B00161
KURANI, INC., DBA PIZZA HUT, Respondent.	)	Judge Robert L. Barton, Jr.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(February 23, 1998)

I. BACKGROUND AND PROCEDURAL HISTORY

On September 12, 1997, Valeri Artioukhine (Artioukhine or Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleges that his employer, Kurani, Inc., d/b/a Pizza Hut (Kurani or Respondent) discriminated against him because of his national origin, Compl. ¶¶ 8, 10,[1] which is Russian, see id. ¶ 3. Specifically, Mr. Artioukhine states that Kurani, where he worked as a pizza delivery driver, see id. ¶ 12, fired him on November 26, 1996, because of his national origin, id. ¶ 14(a), (c). Mr. Artioukhine states that his employer refused to give him any reason for his firing. Id. ¶ 14(b). Complainant states that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment

[1] The following abbreviations will be used throughout this Decision and Order:

Compl.	Complainant's Complaint, filed September 12, 1997
Ans.	Respondent's Answer, filed November 18, 1997
PHCR	Prehearing Conference Report, issued December 2, 1997
Voss Aff.	Affidavit of Kurani Vice President Vincent Voss, dated January 9, 1998
Second Voss Aff.	Affidavit of Mr. Voss, dated February 18, 1998
C. OSC Charge	Complainant's charge filed with the Office of Special Counsel for Immigration-Related Unfair Employment Practices, attached to Complaint

Practices (OSC) on March 1, 1997.[2] Id. ¶ 18. Complainant states that OSC sent him a letter that advised he could file a complaint directly with OCAHO. Id. ¶ 19.

Respondent filed its Answer to the Complaint on November 18, 1997. Respondent denies that it fired Complainant because of his national origin; instead, Respondent states that Complainant was fired for physically attacking another employee and for refusing to follow his manager's directions. Ans. at 1 (expressly responding to Complaint paragraphs 9 and 14). Kurani does not respond directly to any other paragraphs of the Complaint. Respondent, however, provides a narrative account of its version of the events that comprise the core of Complainant's narrative, attached to his OSC charge. Respondent's Answer makes references to the number of employees it hires, stating that its state operations manager supervises more than 700 employees, that a named area manager supervises more than 200 employees, and that the assistant restaurant manager at the restaurant where Complainant worked supervised twenty-five employees. Id. at 2.

During a telephone prehearing conference held on December 2, 1997, I discussed with both parties the issue of whether this Court has jurisdiction of Complainant's claim of national origin discrimination. Respondent's representative, Kurani Vice President Vincent Voss, stated during the conference that Respondent employed between 400-450 employees in 1996. See PHCR at 1. I explained to the parties that this Court lacks jurisdiction of a complaint based on national origin discrimination if the employer has more than fourteen employees on its payroll for each day of the week for twenty or more consecutive weeks during the year in question. Id.

Given Respondent's assertions in its Answer and during the conference regarding the number of people it employed, I gave Respondent leave to file, not later than December 17, 1997, a motion to dismiss this case for lack of jurisdiction, along with supporting payroll records and an affidavit. Id. I explained that the payroll records must show that Respondent employed more than fourteen individuals for each day for twenty or more consecutive weeks in 1996, and that Respondent must indicate when its work week begins and ends. Id. I also explained that the affidavit must be prepared and signed by a person who is familiar with the payroll records and can swear to their accuracy and authenticity. Id.

As of December 19, 1997, Respondent's motion and accompanying payroll records and affidavit had not reached my office. I issued an order on that date in which I required Respondent to submit copies of its payroll records for both calendar years 1995 and 1996 no later than January 15, 1998. Respondent's Motion to Dismiss arrived in my office on December 22, 1997. Respondent had mailed it from Anchorage, Alaska, via Express Mail on December 16, 1997. Respondent attached to its Motion payroll records for two of its Pizza Hut sites for the work week starting December 21, 1995, through the work week ending May 22, 1996.

Having received Respondent's Motion and payroll records, I issued an order on December 22, 1997, in which I vacated the portion of my December 19 Order that required

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[2] A copy of Complainant's OSC charge is attached to the Complaint.

Respondent to submit its 1995 and 1996 payroll records. I noted, however, that Respondent did not include the required affidavit or sworn statement with its Motion. Respondent's representative, Mr. Voss, asserted in an unsworn statement that he is familiar with the information and that it is a true and accurate copy of the actual payroll records. I allowed Respondent until January 15, 1998, to file the affidavit. Also, in the December 22 Order, I established January 6, 1998, as the deadline by which Complainant must file any response to the Motion to Dismiss.[3]

On December 26, 1997, Respondent filed a request to rescind my December 19 Order to provide two years of payroll records, given the fact that it already had sent copies of payroll records as previously requested. My December 22 Order, in which I vacated my prior order to Respondent to submit its 1995 and 1996 payroll records, undoubtedly had not reached Respondent by the time it prepared its December 26 pleading. Also in its December 26 pleading, Respondent reiterates its request that I dismiss this case for lack of jurisdiction, and attaches photocopies of the following documents: Mr. Artioukhine's complaint, based on the same core facts as the present OCAHO Complaint, filed with the Alaska State Commission for Human Rights, and a notice of a charge of discrimination sent to Kurani by the Equal Employment Opportunity Commission (EEOC).

The required affidavit had not reached my office by January 15. My law clerk telephoned Mr. Voss on January 21 to try to determine why the affidavit had not yet arrived. Mr. Voss informed my clerk that the affidavit was sent via Express Mail on January 9 and that he previously had confirmed that it was delivered on January 12. My legal technician telephoned the local Post Office and learned that the package had been delivered to our building's mail room; the package, however, failed to make it from the mail room to my office.

The package's mysterious disappearance made it extraordinarily uncertain when, if ever, the original affidavit would surface, so I had my law clerk telephone Mr. Voss and ask him to fax a copy of the affidavit. My clerk left a voice mail message for Mr. Voss to that effect on January 23, 1998, and, having received no response to that message, she called him again on January 28 and spoke with him directly about faxing the affidavit. In addition, during both the January 21 and 28 phone conversations, my clerk requested that Respondent provide information, also in affidavit form, that explains the markings on the submitted payroll records and on a chart Respondent submitted that purports to summarize the contents of the actual payroll records.

Respondent still had not faxed a copy of its affidavit as of February 5, 1998. On that date, I issued a written order in which I ordered Respondent to fax the affidavit to my office no later than February 20. I also ordered Respondent to file by February 20 its second affidavit, in which it would provide the additional information explaining the markings on the payroll records and payroll summary.

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[3] To date, however, Complainant has failed to respond to Respondent's Motion. Complainant also has not answered Respondent's Request to Rescind Order of December 19, 1997, to Provide Payroll Records and Dismiss Case Due to Lack of Jurisdiction, to which he was entitled to respond on or before January 12, 1998.

On February 13, 1998, Respondent's original affidavit, which it had mailed on January 9, reached my office. I learned that our mail room had delivered the package to another office in our building, despite the fact that Respondent had correctly addressed it to me at my office's address. The problem was compounded when the office to which the package was mistakenly delivered kept the package for approximately one month before it forwarded it to me. I regret the delay and inconvenience that is attributable to the mishandling of Respondent's package after it reached Falls Church and before it reached my office. Since the original affidavit had appeared, it no longer would have been necessary for Respondent to fax a copy of it. My clerk attempted to telephone Mr. Voss on three separate occasions late in the afternoon (Eastern Standard Time) on Friday, February 13, but each time received no answer and no opportunity to leave a voice mail message. Respondent faxed a copy of the affidavit the following Monday, February 16, before my office had another opportunity to reach Mr. Voss.[4] Respondent filed Mr. Voss' second affidavit by fax on February 18, 1998.

II. STANDARDS GOVERNING DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

The OCAHO Rules of Practice and Procedure expressly provide for motions to dismiss for failure to state a claim upon which relief may be granted, see 28 C.F.R. § 68.10 (1997), but they contain no specific provision for motions to dismiss for lack of subject matter jurisdiction. The OCAHO Rules, however, provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." Id. § 68.1. Consequently, it is appropriate for me to look to Federal Rule of Civil Procedure 12(b)(1) and federal case law interpreting it for guidance in ruling on a motion to dismiss for lack of subject matter jurisdiction. See Caspi v. Trigild Corp., 6 OCAHO 907, at 3-4 (1997), 1997 WL 131354, at *2-3;[5] United States v. Frank's Meat Co. (In re charge of Franco), 3 OCAHO 1094, 1095-96 (Ref. No. 513) (1993),[6] 1993 WL 403793, at *1; Lardy v. United Airlines, Inc., 3 OCAHO 555, 559-60 (Ref. No. 450) (1992), 1992 WL 535604, at *3.

Federal Rule of Civil Procedure 12 (b)(1) governs motions to dismiss for lack of jurisdiction

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[4] Our offices were closed February 16 in honor of President's Day, a federal holiday.

[5] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

[6] Citations to OCAHO precedents in bound Volumes 1-2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States, and bound Volumes 3-5, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of the pertinent volume. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume 5, however, are to pages within the original issuances.

over the subject matter. A challenge to subject matter jurisdiction may be raised by a facial attack on the sufficiency of the complaint's allegations of subject matter jurisdiction, or by a challenge to the existence of subject matter jurisdiction in fact. See Trentacosta v. Frontier Pacific Aircraft Indus., Inc., 813 F.2d 1553, 1558-59 (9th Cir. 1987);[7] Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). If a facial attack is mounted, the complaint's allegations are assumed to be true for purposes of the motion to dismiss for lack of subject matter jurisdiction. See Trentacosta, 813 F.2d at 1558 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1363, at 653-54 (1969)). However, if a responding party contests the factual existence of subject matter jurisdiction, "[n]o presumptive truthfulness attaches to plaintiff's allegations." Thornhill, 594 F.2d at 733 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). "Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue, resolving factual disputes if necessary." Id. Also, the complaining party has the burden of proof that jurisdiction exists in fact. Id.

In contrast to a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a motion to dismiss attacking subject matter jurisdiction may be made as a speaking motion[8] "without converting the motion into a motion for summary decision." Trentacosta, 813 F.2d at 1558 (citations omitted). If, however, the jurisdictional motion involves factual issues that also go to the merits of the underlying claim, "the trial court should employ the standard applicable to a motion for summary judgment." Id. (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)); see also Steen v. John Hancock Mutual Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997); Thornhill, 594 F.2d at 733-34.

In this case, the number of employees Respondent employed is an element that dictates whether I have jurisdiction over Complainant's claim, but it also comprises a substantive portion of the cause of action, see 8 U.S.C. § 1324b(a)(2)(A)-(B) (1994) (providing exceptions, based on the number of employees that an employer hires, for the prohibition of citizenship status and/or national origin discrimination). Therefore, I will apply the standards for summary adjudication to

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[7] Judicial review may be obtained "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. § 1324b(i)(1) (1994); see also 28 C.F.R. § 68.53(b) (1997). As the events underlying this action occurred in Alaska, and as Respondent is located and transacts business in Alaska, precedent from the Court of Appeals for the Ninth Circuit is controlling here.

[8] A "speaking motion" is a motion that "requires consideration of matters outside the pleadings." Black's Law Dictionary 1252 (5th ed. 1979). Respondent's Motion to Dismiss is such a motion because it relies on copies of payroll records and affidavits.

Respondent's Motion.[9]

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996).[10] Only facts that will affect the outcome of the proceeding are deemed material. United States v. Aid Maintenance Co., 6 OCAHO 893, at 4 (1996), 1996 WL 735954, at *3 (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); United States v. Tri Component Product Corp., 5 OCAHO 821, at 3 (1995), 1995 WL 813122, at *3 (Order Granting Complainant's Motion for Summary Decision) (citing same and United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994), 1994 WL 269753, at *2). An issue of material fact must have a "real basis in the record" to be considered genuine. Tri Component, 5 OCAHO 821, at 3, 1995 WL 813122, at *3 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. (citing Matsushita, 475 U.S. at 587 and Primera, 4 OCAHO 615, at 2, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. Id. at 4 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991), 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." Alvand, 1 OCAHO at 1959, 1991 WL 717207, at *2 (citing Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or
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> denials of such pleading. Such response must set forth specific facts showing that

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[9] The same result would be reached in this case no matter which standard were applicable because, as will be discussed later, there are no disputed factual issues that I need to resolve.

[10] The OCAHO provision for summary decision is similar to Federal Rule of Civil Procedure 56, which provides for summary judgment.

there is a genuine issue of fact for the hearing.

28 C.F.R. § 68.38(b) (1996).

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file as part of the basis for summary judgment. Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." Id. (citing Primera, 4 OCAHO 615, at 3, 1994 WL 269753, at *2, and United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991), 1991 WL 531744, at *3).

III. DISCUSSION AND ANALYSIS

OCAHO jurisdiction over a national origin discrimination claim is limited to instances in which the charged employer employs more than three employees, see 8 U.S.C. § 1324b(a)(2)(A) (1994), and in which the Equal Employment Opportunity Commission (EEOC) does not have jurisdiction under section 2000e-2 of Title 42 of the United States Code, see id. § 1324b(a)(2)(B). "For purposes of determining EEOC jurisdiction over a claim of national origin discrimination against a particular employer under 42 U.S.C. § 2000e-2, the term 'employer' is defined as, 'a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .'" Flores v. Logan Foods Co., 6 OCAHO 874, at 4-5 (1996), 1996 WL 525690, at *4 (quoting 42 U.S.C. § 2000e(b)). Consequently, I lack jurisdiction over claims of national origin discrimination in which the charged employer employs fifteen or more employees, as that number is calculated for purposes of determining EEOC jurisdiction. See Caspi v. Trigild Corp., 6 OCAHO 907, at 5-6 (1997), 1997 WL 131354, at *4-5; Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 13-14 (1996), 1996 WL 670179, at *9-10, aff'd, Toussaint v. Office of the Chief Administrative Hearing Officer, No. 96-3688 (3d Cir. 1997); Flores, 6 OCAHO 974, at 4-5, 1996 WL 525690, at *4.

The payroll records Respondent has submitted indicate that Respondent's working days are all seven days of the week. The "current" and "preceding" calendar years, as mentioned in 42 U.S.C. § 2000e(b), refer to the year in which the alleged discrimination occurred and the year before the alleged discrimination occurred, respectively. See Walters v. Metropolitan Educ. Enters., Inc., 117 S. Ct. 660, 662-63 (1997) (stating that 1990 and 1989 were the current and proceeding years for the purposes of an alleged retaliatory discharge that occurred in 1990). As Complainant was fired in 1996, the relevant calendar years in this case are 1996 and 1995. Respondent has provided payroll records for two of its Pizza Hut sites for the work week starting December 21, 1995, through the work week ending May 22, 1996. That period includes twenty consecutive work weeks in 1996. If Respondent had fifteen or more people in its employ for each of its working days for those twenty weeks in 1996, then this tribunal lacks jurisdiction over the subject matter of Complainant's claim.

For purposes of determining EEOC jurisdiction, the U.S. Supreme Court has determined that

individuals are counted as employees if they have an employment relationship with the employer on the day in question. Id. at 663-64. "This test is generally called the 'payroll method,' since the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." Id. at 663. As long as an individual has an employment relationship with the employer on a given day, that individual is counted toward the total number of employees for that day even if he or she does not work or is not compensated on that particular day. See id. at 664. If an individual begins or ends employment in the middle of a calendar week, that individual does not count toward the fifteen employee minimum for that week. See id. at 664-65. Additionally, as case law differentiates between "employers" and "employees" for purposes of determining EEOC jurisdiction, "[a] company president and supervisory personnel are not considered employees for jurisdictional purposes." Toussaint, 6 OCAHO 892, at 14, 1996 WL 670179, at *10.

Respondent's Vice President, Mr. Voss, avers in a sworn statement that he is familiar with the records provided and that they are "true and actual copies of the payroll records from January 1, 1996 through May 22, 1996 on two of the Pizza Hut restaurants owned and operated by Kurani, Inc." Voss Aff. at 1. Mr. Voss further states that the chart Respondent provided that summarizes the content of the payroll records does not include management and supervisory personnel. Id. In a second sworn statement, Mr. Voss explains the symbols that appear on the payroll records, see Second Voss Aff. at 1, enabling an accurate interpretation of those records.

Respondent's payroll records make it clear that Respondent had fifteen or more employees for each working day in each of twenty weeks in 1996. In fact, the records show that Respondent had in excess of fourteen employees at one of its business sites alone; the records from Respondent's Northway Mall location, where Complainant worked, show that Respondent had no fewer than twenty-six employees at that site for each working day in each of twenty weeks in 1996.[11]

Complainant has disputed none of the facts Respondent has presented, and has failed completely to file a response to Respondent's Motion to Dismiss. Also, Complainant himself has asserted that Respondent employed fifteen or more individuals. See C. OSC Charge at 2 (marking box to indicate that Respondent employed "15 or more employees"). Based on all the foregoing, I lack subject matter jurisdiction over Complainant's claim and must dismiss the Complaint.

IV. CONCLUSION

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[11] In counting Respondent's employees, I tallied only the people from its payroll whose names also appeared on Respondent's composite chart to ensure that no supervisory personnel were included. See Voss Aff. at 1 (stating that the composite chart submitted with the payroll records does not contain management and supervisory personnel). Also, if I could not determine the exact first or last day of work for people added to or deleted from the payroll roster, I did not count them for their first and/or last week on the payroll to ensure that individuals who arrived and/or departed mid-week were not included. See Walters, 117 S. Ct. at 664-65 (explaining that individuals who begin or end employment in the middle of a calendar week do not count toward the fifteen employee minimum for that week).

I find that there are no disputed issues of material fact and that Respondent employed fifteen or more individuals over the relevant time frame. Consequently, I lack subject matter jurisdiction over Complainant's claim, and Respondent's Motion to Dismiss is GRANTED.

As provided by statute, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i)(1) (1994); 28 C.F.R. § 68.53(b) (1997).

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998, I have served the foregoing Decision and Order Granting Respondent's Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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